NO. 324

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

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PRESTON A. TATE,

Petitioner

v.

HERMAN SHORT, Chief of Police, Houston, Texas,

Respondent

* * *

On Writ of Certiorari to the Court of Criminal Appeals of Texas

* * *

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

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OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas is reported at 485 S.W.2d 210 (1969), and a copy of that opinion appears in the Appendix at page 5. The opinion of the County Criminal Court at Law No. 1 of Harris County, Texas, is not reported, and a copy of that opinion appears in the Appendix. (A. 33).

JURISDICTION

The jurisdiction of this Court to review by writ of certiorari the judgment of the Court of Criminal Ap-

peals of Texas is conferred by 28 U.S.C. §1257(3). Certiorari was granted on June 29, 1970. It is questioned by the Respondent that any substantial federal question is presented for adjudication by the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eighth Amendment to the United States Constitution:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Fourteenth Amendment to the United States Constitution:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 4.14, Texas Code of Criminal Procedure, provides as follows:

> "Art. 4.14 [62], [108], [98], Corporation Court.
>
> "The corporation court in each incorporated city, town or village of this State shall have jurisdiction within the corporate limits in all criminal cases arising under the ordinances of such city, town or village, and shall have concurrent jurisdiction with any justice of the peace in any precinct in which said city, town or village is situated in all criminal cases arising under the criminal laws of this State, in which punishment is by fine only, and where

the maximum of such fine may not exceed two hundred dollars, and arising within such corporate limits."

Texas, Vernon's Ann. Code Crim. Procedure, Art. 45.06:

> The governing body of each incorporated city, town or village shall by ordinance prescribe such rules, not inconsistent with any law of this State, as may be proper to enforce, by execution against the property of the defendant, or imprisonment of the defendant, the collection of all fines imposed by such court ....

Article 43.09, Texas Code of Criminal Procedure, provides as follows:

> "Art. 43.09 [793] [878] [856] Fine discharged.
>
> "When a defendant is convicted of a misdemeanor and his punishment is assessed at a pecuniary fine, if he is unable to pay the fine and costs adjudged against him, he may for such time as will satisfy the judgment be put to work in the workhouse, or on the county farm, or public improvements of the county, as provided in the succeeding Article; or if there be no such workhouse, farm or improvements, he shall be imprisoned in jail for a sufficient length of time to discharge the full amount of fine and costs adjudged against him; rating such labor or imprisonment at five dollars for each day thereof; provided, however, that the defendant may pay the pecuniary fine assessed against him at any time while he is serving at work in the workhouse, or on the county farm, or on the public improvements of the county, or while he is serving his jail sentence, and in such instances he shall be entitled to a credit of five dollars for each day or fraction of a day that he has served and he shall only be required to pay

his balance of the pecuniary fine assessed against him. Acts 1965, 59th Leg. vol. 2, p. 317, ch. 722."

The following sections of the Code for the City of Houston, Texas, are also involved:

Section 15-60: Commitment to Jail Until Fine Paid: Stay of Judgment:

Unless a judgment for fine by the corporation court is appealed from and an appeal bond approved and filed, it shall be the duty of the clerk to forthwith issue a commitment, directed to the chief of police, or, any policeman of the city, to commit the defendant to the city jail or city farm until the full amount of the fine is paid, or until the defendant is discharged according to law; provided, for good cause shown, the judge of the corporation court, in his discretion, may order a stay of judgment for a period not to exceed thirty (30) days, in which event the defendant shall not be committed to the city jail or city farm until after the expiration of the time such judgment is held in abeyance.

Section 15-61: Remittance of Fine:

In all cases mentioned in section 15-60, where it appears from the facts and circumstances surrounding a particular case that justice has not been served, or that an unjust or excessive fine has been imposed in such case, the presiding judge of the corporation courts and the clerk of the corporation courts jointly may recommend, upon a form designated by the mayor for that purpose, that the fine imposed, or any part thereof, be remitted. Such recommendation shall state the name of the defendant, the offense upon which conviction was had, the amount of fine imposed therefor, the reasons for the recommendation, and such other information as the mayor shall from time to time designate or require, and the mayor may, in

his sole discretion, approve, modify or disapprove, such recommendation in whole or in part. The action of the mayor shall be transmitted to the clerk of the corporation courts to be entered upon the corporation court docket by the clerk and to the controller who shall authorize a refund of so much of the fine as the mayor, in his sole discretion, in each particular case, shall so designate.

Section 35-8: Credit Against Fine For Service in Jail or Municipal Prison Farm:

Each person committed to the county jail or to the municipal prison farm for non-payment of their fine arising out of his conviction of a misdemeanor in the corporation court shall receive a credit against such fine of five dollars ($5.00) for each day or fraction of a day that he has served.

QUESTIONS PRESENTED

I.

IF A PENAL LAW PROVIDES THAT A PERSON VIOLATING THE SAME SHALL BE PUNISHED BY A FINE, AND IF A PERSON CONVICTED OF VIOLATING SUCH LAW IS ASSESSED A FINE BUT REFUSES TO PAY IT, DOES THE CONSTITUTION OF THE UNITED STATES PROHIBIT THE IMPRISONMENT OF THAT PERSON FOR FAILURE TO PAY THE FINE?

II.

MAY THE PAYMENT OF A FINE ASSESSED AGAINST A PERSON FOR THE VIOLATION OF A PENAL LAW BE ENFORCED IF THE PAYMENT OF SUCH FINE WILL WORK A HARDSHIP UPON HIM? OR, AS A COROL-

LARY, DOES THE UNITED STATES CONSTITUTION PROHIBIT THE ASSESSMENT AND/OR COLLECTION OF A MONETARY FINE IF THE PERSON SO FINED WILL BE SUBJECTED TO A HARDSHIP THEREBY? IF SO, WHAT GUIDELINES MAY A COURT USE TO DETERMINE THE CONSTITUTIONALLY PERMISSIBLE DEGREE OF FINANCIAL INCONVENIENCE, IF ANY, TO WHICH A PERSON SO CONVICTED MAY BE SUBJECTED?

III.

IS THERE, IN EFFECT, AND BY WHATEVER TERM IT MAY BE MORE EUPHEMISTICALLY CALLED, A FEDERALLY PROTECTED "INDIGENCY EXEMPTION" FROM PENAL RESPONSIBILITY FOR THE VIOLATION OF LAWS WHERE A FINE ONLY IS IMPOSED FOR SUCH VIOLATION?

IV.

IF A SCOFFLAW ALSO QUALIFIES FOR A FEDERALLY PROTECTED "INDIGENCY EXEMPTION," IS HE NOT, IN EFFECT, GIVEN A *CARTE BLANCHE* TO VIOLATE ANY PENAL LAW PUNISHABLE BY FINE ONLY?

V.

IF THE SANCTION FOR VIOLATING A PENAL LAW IS BY FINE ONLY, AND IF A PERSON IS CONVICTED OF VIOLATING SUCH PENAL LAW AND IS ASSESSED A FINE AS A PUNISHMENT THEREFOR, DOES THE CONSTITUTION OF THE UNITED STATES REQUIRE

THE SENTENCING COURT TO ALLOW THE PAYMENT OF THE FINE BY INSTALLMENTS WHEN THE PERSON SO CONVICTED IS "INDIGENT"?

VI.

IF THE SANCTION FOR VIOLATING A PENAL LAW IS A FINE ONLY, AND IF A PERSON CONVICTED OF VIOLATING SUCH IS ASSESSED A FINE AS A PUNISHMENT THEREFOR, AND IF THE CONSTITUTION OF THE UNITED STATES DOES REQUIRE THE SENTENCING COURT TO ALLOW THE PAYMENT OF THE FINE BY INSTALLMENTS WHEN A PERSON CONVICTED OF THE VIOLATION THEREOF IS "INDIGENT," WHAT GUIDELINES MAY THE COURT FOLLOW TO DETERMINE:

A) WHAT IS "INDIGENCY" UNDER THE FEDERAL COURTS' CONSTRUCTION OF THE UNITED STATES CONSTITUTION, THE CONSTITUTION ITSELF (NOR ANY AMENDMENTS THERETO) NOT MENTIONING IT?

B) WHAT IS THE MONETARY AMOUNT OF SUCH INSTALLMENT, AND WHAT INTERVALS THEREOF, WILL BE CONSTITUTIONALLY PERMISSIBLE?

C) MAY A PERSON CONVICTED OF THE VIOLATION OF THE SAME LAW, AND ASSESSED A FINE THEREFOR, BUT WHOSE AFFLUENCE IS ABOVE THE FEDERALLY PROTECTED "INDIGENCY

LEVEL," ALSO PAY HIS FINE BY INSTALLMENTS SO THAT HE WILL NOT BE AS GREATLY INCONVENIENCED THEREBY?

VII.

IF THE CONSTITUTION OF A STATE EXPRESSLY PROHIBITS THE GARNISHMENT OF CURRENT WAGES, AND IF THE STATE EXEMPTION STATUTES EFFECTIVELY MAKE IT IMPOSSIBLE TO COLLECT A MONETARY JUDGMENT AGAINST A POOR PERSON,—DOES THE UNITED STATES CONSTITUTION RENDER THE STATE POWERLESS TO EXACT PUNISHMENT BY MEANS OF INCARCERATION OF A PERSON CONVICTED OF A CRIME AND ASSESSED A FINE AS A PUNISHMENT THEREFOR IF HIS DEGREE OF POVERTY QUALIFIES HIM FOR [FEDERAL] "INDIGENCY EXEMPTION" FROM INCARCERATION?

STATEMENT OF THE CASE

The Legislature of the State of Texas has determined, in the interest of traffic safety, that before being permitted to drive vehicles on the public highways, all persons, be they rich or poor, should be required to possess certain knowledge of the traffic laws as well as have the physical, audile, and visual ability necessary for the minimum acceptable driving skills. The Legislature has further provided that the possession of these skills and abilities should be evidenced by a driver's license. By this law, the rich, the poor, and those reflecting all the intermediate shadings of the

pecuniary spectrum, must pass the same test and meet the same physical standards in order to be entitled to have such a license issued to them. Furthermore, the Legislature has provided that no person, regardless of his wealth or lack thereof, shall drive a motor vehicle on the public ways of the State of Texas without such license.[1] The record here shows:

Petitioner, Preston Armour Tate, did operate a motor vehicle without a license, however, in defiance of the wish of the people of Texas as expressed by their duly elected legislature: He was given a citation and charged with driving without an operator's license on March 3, 1966, and on May 6, 1966, as a result of a jury trial in the Corporation Court of the City of Houston, Texas, he was found guilty and assessed a fine of $25.00. He has not paid that fine.

At 6:52 P.M. on May 6, 1966 (the same day the jury had found him guilty of the March 3 offense), Tate was again cited to appear on June 1, 1966, to answer another charge of driving without an operator's license. He failed to appear. After a capias was finally issued to compel his appearance he was tried on August 8, 1968, at which time he pled *nolo contendere* and was fined $50.00. He has not paid that fine.[2]

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[1]Art. 6687b, V.A.C.S.

[2]In his brief, Petitioner alleges, in re these 1966 convictions, that he gave his attorney a trailer and some cash to represent him. In the transcript of his habeas corpus hearing (Pgs. 16, 17, 18, Pg. 19, L1 1-3), Petitioner stated: "I paid him cash out of my pocket, and eleven hundred dollars worth of goods in a trailer" to represent him on those cases. Though it taxes credulity to understand why a man would pay over $1,100 to fight $75 worth of traffic tickets, if he were to be believed, it would cast a serious doubt as to his contention that he was unable to pay his fines. This could very well have influenced the County Criminal Court at Law not to grant the habeas corpus.

On May 7, 1966, he was again cited to appear on May 30, 1966, to answer for still another offense of driving without an operator's license. He failed to appear. After a capias was finally issued to compel his appearance, he was tried on August 7, 1968. He pled *nolo contendere* and was fined $50.00 for this offense. He has not paid that fine.

On May 14, 1966, he was cited to appear on June 10, 1966, to answer for still another offense of driving a vehicle without an operator's license. He did not appear. After a capias was finally issued to compel his appearance, he was tried on August 7, 1968. He pled *nolo contendere* and was fined $50.00. He has not paid that fine.

What is most pertinent, however, is that, at least until the time of the habeas corpus hearing on August 30, 1968, Tate has *never* obtained a driver's license. On his habeas corpus hearing he testified that his driver's license had expired on December 2, 1965, but did not quit driving until some six weeks before said hearing. Had he obeyed the law and not driven a motor vehicle without a license, he would not have been fined. *It was the operation of a motor vehicle in defiance of law, and not his poverty,* which has gotten him into the predicament about which he now complains.

Likewise, although at the present time Petitioner, Tate, alleges as a contributing factor to his poverty, that he has a wife and two children to support, at the time of his citations for driving without a operator's license, he had no children. Contrary to Tate's allegation of "immediate" imprisonment, in his case enough time has elapsed between the offense and the punish-

ment for two children to have been born unto his marriage.

Likewise, the Legislature of the State of Texas has enacted a uniform traffic code, one of the provisions of which requires a motorist entering an intersection at which a device known as a "traffic light" is installed, to stop when that light facing him is burning red.[3] Petitioner, Preston Armour Tate, violated this law, however, on March 3, 1966. He was cited to appear in court and the jury, on May 6, 1966, found him guilty of this offense and assessed a fine of $50.00. Tate has not yet paid this fine.

Under the aforementioned traffic code, the Legislature has further commanded that a motorist, upon entering an intersection faced with an official traffic control device containing the word, "stop," to so stop before entering said intersection.[4] On May 6, 1966, Petitioner, Tate, disobeyed this law and ran a stop sign. He was cited to appear and answer this charge on June 1, 1966, but failed to appear. After a capias was issued to compel his appearance, he pled *nolo contendere* to this charge on August 7, 1968, and was fined $50.00. He has not yet paid that fine.

Likewise, the Legislature of the State of Texas has, in the valid exercise of its police power enacted a statute requiring that all motor vehicles have current license plates attached to them and it has made a penal offense of the act of driving a vehicle without such license plates.[5] The penalty for the violation of the

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[3] Art. 6701d(33c), V.A.C.S.
[4] Art. 6701d(91), V.A.C.S.
[5] Art. 807b, V.A.P.C.

aforesaid law has been set at a fine not to exceed $200.00 to be levied against the miscreant.

Petitioner, Preston Armour Tate, violated this law on all three separate occasions, May 6, 1966, May 7, 1966, and May 14, 1966. He was caught driving a motor vehicle without current license plates and was cited to appear in Corporation Court on those offenses on June 1, 1966, May 30, 1966, and June 10, 1966. He failed to appear. After a capias was issued to compel his appearance, he appeared on August 7, 1968, pled *nolo contendere,* and was fined $50.00 for each of these offenses.

In an affidavit by Tate's wife, dated August 19, 1968,* as a grounds for her allegation that it would work a hardship upon that Tate family for him to be imprisoned and/or compelled to pay a fine, she stated that on the day of the affidavit, August 19, 1968, she and Petitioner had two children, the oldest of which was one year and eleven months of age. Thus, on the dates of the offenses, and on the dates Tate was cited to appear, there were no children.

OUTLINE OF THE ARGUMENT

I.

THE UNITED STATES CONSTITUTION DOES NOT PROHIBIT A COURT FROM INCARCERATING A MISDEMEANANT FOR FAILURE TO PAY THE FINE ASSESSED AGAINST HIM UPON HIS CONVICTION OF THE MISDEMEANOR.

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*App. Pg. 23.

II.

IF A MISDEMEANANT FAILS TO PAY THE FINE ASSESSED AGAINST HIM UPON HIS CONVICTION OF THE MISDEMEANOR, THE UNITED STATES CONSTITUTION DOES NOT FORBID THE COURT WHICH TRIED AND CONVICTED HIM FROM INCARCERATING HIM FOR SUCH FAILURE, EVEN THOUGH THE STATUTE, UPON WHICH HIS CONVICTION WAS BASED, ONLY RECITED A MONETARY FINE AS THE SANCTION THEREOF.

III.

NO MORE THAN WEALTH SHOULD POVERTY PLACE A PERSON BEYOND THE SANCTIONS IMPOSED BY LAW.

IV.

A REQUIREMENT FOR ALL MISDEMEANOR COURTS TO SET UP CREDIT ARRANGEMENTS FOR MISDEMEANANTS SO AS TO ALLOW THEM TO PAY OUT THEIR FINES IN EASY INSTALLMENTS, WOULD RAISE INSURMOUNTABLE ADMINISTRATIVE AND JUDICIAL PROBLEMS, IMPOSING UNCONSCIONABLE BURDENS UPON SUCH INFERIOR COURTS.

V.

THE CONSTITUTION OF THE UNITED STATES DOES NOT REQUIRE A MISDEMEANOR COURT TO SET UP CREDIT ARRANGEMENTS FOR MISDEMEANANTS SO AS TO ALLOW THEM TO PAY OUT THEIR FINES IN EASY INSTALLMENTS.

BRIEF OF THE ARGUMENT

I.

THE UNITED STATES CONSTITUTION DOES NOT PROHIBIT A COURT FROM INCARCERATING A MISDEMEANANT FOR FAILURE TO PAY THE FINE ASSESSED AGAINST HIM UPON HIS CONVICTION OF THE MISDEMEANOR.

All, or almost all, of the American jurisdictions have laws providing that a person may be imprisoned for failure to pay a fine,[7] and, the Congress of the United States has wisely given Federal Courts that power.[8] Texas, likewise, allows this sanction.[9] A minimal knowledge of human nature would be sufficient to convince one that there is the need of such a power on the part of the Courts, for, as the old truism says, "A law without a penalty for its violation, is mere advice."[10]

As Mr. Justice Cardozo so realistically put it in *Chapman v. Selover*:[11]

> "The state, when it punishes misdemeanors by fine, is not confined to the dubious remedy of a civil action for a penalty . . . The offender who

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[7]See collation of statutes, 90 S.Ct. 2025, et seq. as an appendix to *Williams v. Illinois*, 398 U.S. ——, 90 S.Ct. 2018 (U.S.Sup. 1970).

[8]18 U.S.C.A. #3565.

[9]Art. 45.53, V.A.C. C. P.

[10]For example, Art. 4640, V.A.C.S., prohibited either party to a divorce granted on the grounds of cruel treatment to remarry (except to each other) within one year of the date the divorce was granted. No sanctions were imposed, however, and many, many, persons disregarded it.

[11]225 N.Y. 417, 122 N.E. 206 (N.Y.Ct. App. 1919).

refuses to pay may be imprisoned until the fine is satisfied . . ."

Chief Justice Monroe of the Supreme Court of Louisiana, by use of a very colorful Pauline figure of speech, "articulated" the basic problem to be met and solved:

> "Probably the vast majority of offenders against the criminal laws are without visible assets through which the fines imposed upon them could be collected, and, if no means were provided for enforcing their collection, the sentence to pay a fine would be, in their ears, but as the tinkling cymbal and sounding brass.'"[11]

It is submitted, therefore, that there can be no bona fide quarrel with the general proposition that a court may imprison a person who refuses to pay a fine.

II.

IF A MISDEMEANANT FAILS TO PAY THE FINE ASSESSED AGAINST HIM UPON HIS CONVICTION OF THE MISDEMEANOR, THE UNITED STATES CONSTITUTION DOES NOT FORBID THE COURT WHICH TRIED AND CONVICTED HIM FROM INCARCERATING HIM FOR SUCH FAILURE, EVEN THOUGH THE STATUTE, UPON WHICH HIS CONVICTION WAS BASED, ONLY RECITED A MONETARY FINE AS THE SANCTION THEREOF.

The statutes petitioner violated provided for monetary fines only. Art. V., #19, of the Constitution of the State of Texas limits the criminal jurisdiction of

[11]State v. Abraham, 139 La. 466, 71 So. 769 (La. Sup. 1916).

justice of the peace courts"[11] to those cases where the penalty or fine is not more than $200. Petitioner was assessed those fines and was jailed for his failure to pay them. It is now argued by Petitioner's counsel that in some manner due process has been side-stepped and the Texas Constitution has been circumvented because of incarceration under these circumstances.

As early as 1876, in *Tuttle v. The State*,[12] it was held that this provision was not to be given a construction "interfering in any manner with the authority of such courts to imprison for non-payment of fine or costs . . ."

In *Dixon v. State*,[13] the Supreme Court of Texas held:

> "The fine and costs imposed for offenses are not so properly the principal as an incident—not the end, but a means of enforcing obedience to the laws. In the formation of the organic law, it cannot have been intended that the convicted culprit shall go wholly acquitted of punishment, because a pecuniary liability may have arisen as an incident to, or as a means of enforcing a punishment annexed to his offense.
>
> "The object of the imprisonment authorized by section 47 is not so much to enforce payment, as to insure punishment; and without it a numerous class of the worse offenders, those whose offenses are most pernicious and demoralizing to society, would be licensed to violate the law, and would set them at defiance with impunity." (2 Tex. 483).

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[11]In this instance, the Corporation Court of the City of Houston has concurrent jurisdiction with the Justice of the Peace Court, and can be considered as such. Art. 4.14, V.A.C.C.P.

[12]1 Tex. Ct. App. Rep. 365 (Tex. Ct. App. 1876).

[13]2 Tex. 481 (Tex. Sup. 1847).

It has ever been thus in Texas, and it would expand this brief to unnecessary length and thickness to recite the Texas cases following this doctrine. Anyway, as the interpretation of a local or state law by the highest Court of the State is binding upon federal courts unless in contravention of the Constitution of the United States or of some federal statue, *Lundy v. Michigan State Prison Board,*[11] the crucial question now before this Court is not whether such a policy violates Texas law, but, rather, whether Texas law, itself, contravenes the United States Constitution or laws of the Federal Congress.

Texas law certainly does not contravene the laws of Congress, for, as previously mentioned, that body, itself, has given to the Federal Courts this power of imprisonment for failure to pay a fine, 18 U.S.C.A. #3565. True, the Congress, by 18 U.S.C.A. #3569, provides, in general for the discharge of indigent prisoners, but, subdivision (a) of that statute provides that an indigent cannot be discharged under the aegis of that statute until he has served thirty days imprisonment. Hence, the Congress, in effect, has stated that it is not unconstitutional to imprison a poor person for at least thirty days; maybe thirty-one days is unconstitutional, but not thirty—it is the degree of application, not the principle itself.

Thus, if the Texas procedure should be held unconstitutional, the Constitution of the United States must be looked to. Rather, the current construction of the Constitution must be searched, for the Federal Constitution itself, as written, does not prohibit such incarceration.

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[11] 181 F.2d 772 (C.C.A., 10th, 1950).

III.

NO MORE THAN WEALTH SHOULD POVERTY PLACE A PERSON BEYOND THE SANCTIONS IMPOSED BY LAW.

IV.

A REQUIREMENT FOR ALL MISDEMEANOR COURTS TO SET UP CREDIT ARRANGEMENTS FOR MISDEMEANANTS SO AS TO ALLOW THEM TO PAY OUT THEIR FINES IN EASY INSTALLMENTS, WOULD RAISE INSURMOUNTABLE ADMINISTRATIVE AND JUDICIAL PROBLEMS, IMPOSING UNCONSCIONABLE BURDENS UPON SUCH INFERIOR COURTS.

V.

THE CONSTITUTION OF THE UNITED STATES DOES NOT REQUIRE A MISDEMEANOR COURT TO SET UP CREDIT ARRANGEMENTS FOR MISDEMEANANTS SO AS TO ALLOW THEM TO PAY OUT THEIR FINES IN EASY INSTALLMENTS.

Although Respondent submits that Petitioner's persistent violations of the law mark him as no more than a common scofflaw, Petitioner, on the other hand, has sought to divert attention from his own misdemeanors by mounting an attack against the traditional American socio-judicial concept dedicated to the proposition that a person should be punished for violating the law. He has created this diversionary sally by advancing the rationale that the law by which the Court jailed him is unconstitutional; that *any* incarceration for failure to pay a fine is unconstitutional since a poor person

would be most often subjected to the alternate jail sentence punishment while the man with money would be able to pay his fine and avoid jail. This, petitioner says, works an invidious discrimination against him and all his class. Ergo, he says, such a scheme of things is forbidden by the Federal Constitution. Petitioner left unmentioned, however, that the next and inexorable conclusion to which we would be catapulted by the train of logic thus unleashed would be that "indigents" are creatures specially favored by the law, without fiscal or penal responsibility for their misdemeanors.

Although the Constitution does not contain language forbidding the jailing of an indigent for failure to pay a fine, Petitioner resorts to "construction" and cites three comparatively recent United States Supreme Court cases in support of this proposition: *Griffin v. Illinois*,[17] *Douglas v. California*,[18] and *Williams v. Illinois*.[19]

Griffin held it to be unconstitutional for the State to require an indigent defendant to pay for the transcript needed (or at least extremely helpful) to appeal his trial court conviction. It was the judicial process for determining the guilt or innocence of the indigent that was under consideration, however, and not the type of punishment meted out after guilt vel non was established beyond a reasonable doubt. The Court said:

> "Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due

[17] 351 U.S. 12, 76 S.Ct. 585 (U.S.Sup. 1956).
[18] 372 U.S. 353, 83 S.Ct. 814 (U.S.Sup. 1963).
[19] 398 U.S. ——, 90 S.Ct. 2018 (U.S.Sup. 1970).

Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations." (351 U.S. 18, 76 S.Ct. 590)

It is a far cry, then, and one not called for by legal logic, to extend the import of this proposition to buttress so radical a proposition as that,—even though guilty, a misdemeanant's poverty would create an exemption shielding him from the consequences of that guilt!

In *Douglas*, it was held that the indigent defendants were denied equal protection of the law,

> ". . . where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." (372 U.S. 357, 83 S.Ct. 816)

It was specially pointed out, however:

> "We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court. We are dealing only with the first appeal, granted as a matter of right to rich and poor alike . . . from a criminal conviction. We need not now decide whether California would have to provide counsel for an indigent seeking a discretionary hearing . . . after the District Court of Appeal had sustained his conviction . . . or whether counsel must be appointed for an indigent seeking review of an appellate affirmance of his conviction . . ." (372 U.S. 356, 83 S.Ct. 816)

In the case at bar, Petitioner has been convicted and

has had his conviction affirmed." Thus, it is beyond the pale, or even the penumbra thereto, of *Douglas*.

More nearly in point is *Williams v. Illinois*." In that case, decided at the last term, this Court held that when the aggregate imprisonment exceeds the maximum period fixed by statute and results directly from an involuntary non-payment of a fine and court costs, there is an impermissible discrimination and a violation of the Equal Protection Clause of the Federal Constitution. As the Court said:

> "The narrow issue raised is whether an indigent may be continued in confinement beyond the maximum term specified by statute because of his failure to satisfy the monetary provisions of the sentence." (398 U.S. ——, 90 S.Ct. 2019).

That Respondent's position in the case at bar is not precluded by *Williams*, as Petitioner here contends, can be found in the following language of this Court:

> "It bears emphasis that our holding does not deal with a judgment of confinement for nonpayment of a fine in the familiar pattern of alternative sentence of '$30 or 30 days'. We hold only that a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine. A statute permitting a sentence of both imprisonment and fine cannot be parlayed into a longer term of imprisonment than is fixed by the statute since to do so would be to accomplish indirectly as to an indigent that which cannot be done directly . . ." (398 U.S. ——, 90 S.Ct. 2023)

"*Tate v. State*, 445 S.W.2d 210 (Tex. Cr. App. 1969).
"398 U.S. ——, 90 S.Ct. 2018 (U.S.Sup. 1970).

* * * * *

"Nothing we hold today limits the power of the sentencing judge to impose alternative sanctions permitted by Illinois law; . . ." (398 U.S. ——, 90 S.Ct. 2024).

In *pari materia* with *Williams* is *Morris v. Schoonfield*," which, in itself, is of little or no precedental value. However, a written opinion concurring in the result, is a helpful explanation of the scope of *Williams*:

". . . Neither does it (*Williams*) finally answer the question whether the State's interest in deterring unlawful conduct and in enforcing its penal laws through fines as well as jail sentences will justify imposing an 'equivalent' jail sentence on the indigent who, despite his own reasonable efforts and the State's attempt at accommodation, is unable to secure the necessary funds . . ." (—— U.S. ——, 90 S.Ct. 2233).

That this Court was well aware of the problems posed by such a case as the one at bar, and was unwilling to go so far as advocated by Petitioner here, is evidenced by the following statement in *Williams*:

"The State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction." (398 U.S. ——, 90 S.Ct. 2024).

It is submitted, therefore, that this Court in *Williams*, was unwilling to give a scofflaw, who also qualified as an indigent, a *carte blanche* enabling him to

"—— U.S. ——, 90 S.Ct. 2232 (U.S.Sup. 1970).

violate at will, and free from danger of punishment, those statutes providing pecuniary sanctions only. Indeed, the result would be chaotic. An indigent would be licensed to tie up a parking space in downtown Houston, free of charge, all day long; he could spit at will on the sidewalks and in all public buildings; he could run all traffic lights; drive his automobile without a license, ad infinitum. Furthermore, any lawyer or judge who has even had a casual brush with the collection of open accounts or back alimony and child support payments will know that *the plea of poverty and inability to pay is the knee-jerk reaction of the overwhelming majority of debtors when asked to pay.* It would take unadulterated naivete not to acknowledge that a misdemeanant would plead poverty in order to avoid the consequences of his wrong doing. How, then, is the Court to separate the wheat from the chaff and determine who is the real indigent? The collateral issues raised would be insurmountable.

It should also be recognized what a corporation court is like in such a city as Houston. The judges are faced with an overwhelming number of cases, and are called upon to decide one right after the other and thus could not possibly give the time necessary not only to the consideration, but to the investigation as well, of each of these cases. For instance, suppose a person is fined $25.00 for driving a motor vehicle without an operator's license,—like Petitioner was fined on May 6, 1966. Suppose, further, that Petitioner had stated at that time that he was impoverished. With a dozen or more defendants standing around awaiting the disposal of their cases, what amount of time and/or investigation would be required of the sentencing judge

(under the United States Constitution) to give to this plea of indigency? Would he have been required to have the City of Houston spend more than $25.00 to investigate, inventory and appraise the assets of the Petitioner? Would he have been required to hold a conference with Petitioner's accountant, appraiser, and preacher (if any) before passing sentence? Unless some strict procedural guidelines are laid down, the Corporation Courts are going to tend to err either on the side of cursory investigation (which would not solve the problem posed) or they will so bog themselves down with collateral issues that they will have no time for judging.

Respondent would here like to emphasize the obvious; that the "nitty gritty" of a Corporation Court's work, dealing with hundreds of traffic violations each day as well as the inevitable number of drunks, petty misdemeanors, and the like, make its work much different from that of a Federal District Court. The latter Courts, although certainly not idle, by the very nature of the criminal matters over which they have original jurisdiction, are able to devote much more time to investigation and contemplation than is possible for a local Corporation Court. The Federal experience, it is submitted, would not be helpful here."

"The writer of this brief is reminded of a movie, a comedy he once saw, which is very apropos. Two ex-convicts, each with many convictions, were discussing their favorite penitentiaries. One said he liked Leavenworth and Atlanta the best because, "you meet a higher type of con in Federal stirs. —bankers, big time tax dodgers, and fellows like that." The point to be made is that the experience of the Federal Courts would not necessarily be helpful in solving Corporation or Police Court problems.

As previously quoted, this Court in *Williams* held that "*The State is not powerless to enforce judgments against those financially unable to pay a fine.*" And, quoting with approval from its own opinion in *Rinaldi v. Yeager*,[11] it held:

> "'Any supposed administrative inconvenience would be minimal, since * * * (the unpaid portion of the judgment) could be reached through the ordinary process of garnishment in the event of default.'" (398 U.S. ——, 90 S.Ct. 2024).

It is submitted that in Texas the Court *would* be "powerless to enforce judgments against those financially unable to pay a fine," and thus it would discriminate in their favor and against those who *are* so able. Unlike those of most other States, the Constitution of the State of Texas expressly forbids the garnishment of wages;[12] the liberal exemption statutes of Texas protect a married man's homestead, automobile, furniture, dogs, etc., from execution.[13] In fact, it is a practical impossibility to collect a judgment in Texas from a low income wage earner who is prudent enough not to keep a bank account. Thus, the rationale of *Rinaldi* would not apply.

Since *Williams* does not prohibit incarceration for failure to pay a pecuniary fine, *and as even the Federal statutes require an indigent to serve at least thirty days before being given an "indigency exemption,"*[14] it is respectfully submitted that this Court, in the

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[11]384 U.S. 305, 86 S.Ct. 1497 (U.S.Sup. 1966).

[12]Constitution of the State of Texas (1876), Art. XVI, Sect. 28.

[13]Art. 3832, V.A.C.S.

[14]18 U.S.C.A., #3569.

case at bar, should follow the doctrine of the Federal Courts in *Bowles v. District of Columbia*:"

> "Imprisonment is not provided either by the ordinance or by the Code as an alternative punishment; but imprisonment is very properly provided as the only available mode for the enforcement of the fines imposed as punishment. *Without it there would be no practicable means for the enforcement of fines.* . . ." (22 App. D.C. 328, emphasis added).

Persuasive, also, is *United States ex rel Privitera v. Kross*," which held:

> "Wholly beside the point is his contention that whereas lack of funds compels him to remain incarcerated for another sixty days, another defendant, possessed of $500, convicted of the same crime and similarly sentenced, could effect his immediate release. The sentence was not imposed upon petitioner because he was indigent; it was visited upon him because he had committed a crime. And once convicted, petitioner has no constitutional right that another defendant, no matter what his economic status, rich or poor, receive the same sentence for the same offense. . . " (239 F.Supp. 120).

It is of more than passing academic interest to note, also, that in 1850, Texas law provided:

> "For all fines assessed . . . in criminal cases not capital, the person convicted may stand committed to prison by order of the court until such fine and costs be paid; and when it shall be made to appear to the court that the person so committed hath no estate or means to pay such fine and costs, it shall be the duty of the court to discharge such person

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"22 App. D.C. 321 (Ct.App.D.C. 1903).
"239 F. Supp. 118 (U.S.D.C., S.D., N.Y. 1965).

from further imprisonment for such fine and costs as in its discretion may deem proper.'"[30]

This outright "poverty exemption" was abolished in 1856;[31] and has never been re-enacted. It should be presumed, therefore, that Texas gave Petitioner's theory a "reasonable and empirical" try and rejected it.

INSTALLMENT PAYMENTS

Rather than to take the drastic and patently untenable position that the Courts cannot enforce payment of their pecuniary penalties by means of incarceration, the Petitioners take the position that the poor should be allowed to pay their fines by means of a judicial adaptation of that old American habit of "buy now, pay later," or as to misdemeanors and traffic violations it could be defined, "speed and over park now—pay later in easy painless installments."

As an abstract proposition, this contention has a certain idealistic, albeit naive penumbra about it. A mere cursory look at this, however, will show that the questions raised are insurmountable:

1. What is the cut-off point between those persons entitled to installment payments and those who are not?
   a) Would the "equal protection" clause be violated if the indigent, because of his status as such, gained an economic advantage over his more affluent fellow citizens?
2. How would the amount of the payments and the intervals between the installments be decided?

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[30]Hartley, Digest of the Laws of Texas, 1850, Art. #401.
[31]General Laws, Seventh Legislature, 1857, Ch. 151, Pg. 228, Gammel's Laws.

(i.e., what would be the maximum income and/or assets he would be allowed to have before becoming liable even for the payment of installments?).

3. Would installment due process demand a hearing on the question of installment vel non separate and apart from the main trial to determine such collateral matters as the convicted Defendant's earning capacity, other family income, debts, mortgage payments, general needs, standard of living, market value of his personal and real assets, ad infinitum?

4. Would the Court have to provide machinery for review of the installment schedule when charges of Defendant's circumstances are alleged? Would the substantial evidence rule apply?

5. What would be the disposition of a case where a habitual misdemeanant also qualifies as an indigent? In other words, would there be a certain net worth, below which a person would be exempt from all penal responsibility?

6. The Constitution of the State of Texas prohibits the garnishment of wages, and its statutes provide such liberal exemption from execution that it is, as a practical matter, impossible to collect a monetary judgment from a person who does not own non-homestead realty and/or a bank account in his own name. In such a situation, how could the payment of the installments ever be exacted without the ultimate sanction of incarceration?

It is submitted, therefore, that the problems raised by forcing corporation courts to set up a "credit department," so to speak, would not only be insurmountable, but it would be an extension of the Constitution

beyond the wildest phantasy of its framers. Nor, it is submitted, does the Constitution require a "punishment" imposed for violation of the penal laws to be so easy and painless that it would cease to act as a deterrent. Nor should it be forgotten that the City of Houston offers a 30-day deferment," which is an installment of sorts.

WHEREFORE, it is submitted that Petitioner, Preston Armour Tate, by his repeated violations of the laws of the State of Texas, is in no position to use a plea of poverty to shield him from the consequences of driving a motor vehicle without a license, and in violation of the law, for more than two and one-half years, for running stop signs and red lights, and for driving a motor vehicle without license plates on more than one occasion. It is further submitted that his conviction and incarceration should in all things be sustained.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gilbert J. Pena, Assistant Attorney General of Texas, attorney for Respondent, do hereby certify that I am a member of the Bar of the Supreme Court of the United States and that copies of the above and foregoing Brief for Respondent have been deposited in the United States Mail, postage prepaid, on this the ---- day of September, 1970, to the following addresses: Mr. Peter Sanchez Navarro, Jr., Houston Legal Foundation, 708 Main Street, Houston, Texas 77002; Mr. Roy Lucas, The James Madison Constitutional Law Institute, 26 West 9th Street, Suite 9C, New York, N. Y. 10011; Mr. Norman Dorsen, School of Law, New York University, Washington Square South, New York, N. Y. 10003.

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